Supreme Court, U.S.
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No. 09-913

In The Supreme Court of the United States

Elvis David Lewis
PETITIONER

v.

Eric H. Holder, Jr., Attorney General
RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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BRIEF REPLY

The BIA's decision to deny Petitioner Elvis Lewis' ("Mr. Lewis") motion to reopen *sua sponte* is an act of agency discretion delegated to the BIA by regulation under 8 CFR 1003.2(a), and under the this Court's recent decision in *Kucana v. Holder*, 130 S. Ct. 827 (2010), a Circuit Court has the power to review matters delegated by regulation.

Id. at 831. (holding that the prohibition on judicial review applies to "statutory, but not to regulatory, specifications"). Mr. Lewis' due process rights were violated and the Respondent fails to address the underlying due process violations which initially and repeatedly have denied Mr. Lewis a full and fair opportunity to present his case, in conformity with the due process rights articulated under the Fifth Amendment. *Salgado-Diaz*, 395 F.3d 1158, 1165-66 (9th Cir. 2005); *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 370 (9th Cir. 2003). Mr. Lewis' claim also presents colorable legal questions.

I. Judicial Review of Constitutionally Protected Rights Cannot be Circumscribed by Executive Regulation

Respondent's brief essentially argues that because the Fourth Circuit partially denied Mr. Lewis' motion based on 8 U.S.C. § 1227(a)(2)(A)(iii) and 8 U.S.C. § 1227(a)(2)(B)(i), the BIA's decision is unreviewable. Respondent's Brief ("Resp. Br.") at 10-13. A Circuit Court's decision to deny review must consider all alleged errors. Mr. Lewis' case presents important underlying constitutional questions which should have caused the BIA to remand the case at which time Mr. Lewis would have an opportunity to present evidence. Judicial review of administrative decisions has long been seen as the primary mechanism for ensuring fair and impartial agency decision-making. *Kucana v. Holder*, 130 S. Ct. 827 (2010) (noting the

importance of judicial review of motions to reopen); *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993).

Here, Mr. Lewis was never afforded an opportunity to present evidence on material issues and his due process rights were violated when he was prevented from presenting evidence in his case. A finding of removability does not necessarily preclude review by this Court when the record demonstrates other important procedural errors. Specifically, the BIA and the Fourth Circuit upheld the Immigration Judge's determination that Mr. Lewis had made a false claim of citizenship based on an incomplete record and without affording Mr. Lewis an opportunity to testify completely, violating his right to due process. *See Salgado-Diaz v. Ashcroft*, 395 F.3d 1158 (9th Cir. 2005) (holding that due process requires a full and fair hearing including an opportunity to present evidence). It is these errors which should have been addressed below, and that robbed Mr. Lewis of his constitutionally protected due process rights.

Respondent argues that the Fourth Circuit was bound by its prior decision in *Mosere v. Mukasey*, 552 F.3d 397 (4th Cir. 2009), *cert. denied by Mosere v. Holder*, 130 S. Ct. 137 (2009), claiming that this precedent prevents the Fourth Circuit from reviewing the BIA's decision. (Resp. Br. at 11). However, as this Court is aware, a prior decision by this Court is only binding insomuch as the decision remains persuasive and is on all fours

with the current case. *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision'") (quoting *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940)). Because the *Mosere* decision was decided before this Court's recent decision in *Kucana*, this Court should re-evaluate the persuasiveness of that reasoning in light of this Court's most recent opinion.

In *Kucana* this Court took pains to highlight the importance of judicial review of procedural safeguards and to reiterate that the Attorney General should not be allowed "a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" 130 S. Ct. at 840. Respondent's argument attempts to circumscribe the power of the Circuit Courts to review executive decisions that implicate constitutionally protected procedural safeguards simply by refusing to provide a standard of review for *sua sponte* review. Resp. Br. at 11 (claiming that the issues presented are "unreviewable because it is committed to the Board's discretion by law").

As the *Kucana* Court's decision indicates, the judiciary ought not so easily cede reviewability of important procedural issues merely because the executive (and not Congress) classifies them as "discretionary." *Id.* Unlike *Mosere*, the instant case

involves important procedural safeguards of the type specifically identified in *Kucana*. *Id.* at 837 (noting that a reversal of the BIA's decision not to reopen "touches and concerns only the question whether the alien's claims have been accorded a reasonable hearing"). *Kucana* indicated that decisions which implicate the fundamental fairness of the underlying agency action are generally given more access to judicial review than agency determinations regarding substantive policy determinations. *Id.* at 837.

Here, this Court is presented with alleged errors in both the substantive and procedural elements of Mr. Lewis' case; however, Mr. Lewis' most basic grievance remains his incomplete and unconstitutional denial of a full and fair hearing on the issue of whether he falsely represented himself as a United States citizen. Because these errors go directly to the substance of whether Mr. Lewis was afforded a fair hearing, this case presents issues of the very type the *Kucana* Court considered ripe for judicial review. 130 S. Ct. at 837.

In sum, Respondent has argued that this Court is unable to review the BIA decision because a lack of agency standards make review impossible. (Resp. Br. at 13.) Respondent's argument, however, relies on unpersuasive authority from the Fourth Circuit that was decided without the benefit of this Court's decision in *Kucana*. Respondent's argument advocates a bright-line rule preventing any judicial review of

BIA decisions not to reopen a case *sua sponte*, regardless of the underlying errors. Such an inflexible and overly rigid rule would strip the Circuit Courts of the important oversight functions necessary to ensure aliens are given full and fair hearings complete with necessary procedural safeguards. Although this Court may not be eager to engage in wholesale review of all *sua sponte* BIA decisions, the Court can and should permit a threshold determination regarding the nature of the underlying grievance, and when, as in this case, the underlying errors implicate constitutional due process, allow limited review to ensure compliance with constitutionally required procedural due process. As this Court indicated in *Kucana*, important distinctions should be made between procedural and substantive issues when considering whether to allow judicial review

II. Mr. Lewis Raised Important Legal Questions that Merit Review

Respondent argues that Mr. Lewis does not raise a "colorable legal issue" since the "Board determined that petitioner was removable.. [and] [t]hose fact-based determinations do not raise questions of law." (Resp. Br. At 15). However, because the Board is not permitted to make findings of fact, and must instead rely on the record developed by the Immigration Judge, the Board's decision in this case is not a fact-based determination, but is a pure legal question. *Adbulai v. Ashcroft*, 239 F.3d 542, 549-50 (3d Cir.

2001)(The Board must make its decision based upon the record developed by the record developed by the Immigration Judge.) When the Board "determined" that Mr. Lewis had falsely claimed to be a United States Citizen under 8 U.S.C. § 1227(a)(3)(D), it was merely making a legal conclusion regarding the sufficiency of the evidence presented below. In this case, the only evidence relied upon by the Immigration Judge were a partial passport of unknown origin and an I-9 Employment Eligibility Verification Form ("Form I-9") where the box for "Citizen or National of the United States" was checked.

On April 3, 2009, the USCIS amended Form I-9. The predecessor Form I-9[1] asked applicants to check a box if they were a "Citizen or National of the United States." The updated Form I-9 removed this language and instead asks applicants to select between either "A *citizen* of the United States" or a "noncitizen *national* of the United States." (emphasis added).

Leading up to that decision, numerous Circuit Courts had found the language of this Form I-9 problematic, and noted that checking the box as a non-citizen alien did not constitute a false claim of citizenship under 8 U.S.C. § 1227(a)(3)(D). *U.S. v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004); *Rodriguez*

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[1]This version of Form I-9 was the one at issue in Mr. Lewis' case below.

v. Mukasey, 519 F.3d 773 (8th Cir. 2008) Given the ambiguity present in the Form I-9 filled out by Mr. Lewis, it was improper to rely upon this Form I-9 in deciding whether Mr. Lewis made a false claim of citizenship under 8 U.S.C. § 1227(a)(3)(D).

Respondent argues that the Immigration Judge "reviewed the evidence and testimony and make specific findings that petitioner made a false claim of citizenship" (Resp. Br. at 15). Respondent contends that this finding by the Immigration Judge, coupled with Mr. Lewis' failure to initially contest the validity of the Immigration Judge's findings as to his claim of citizenship bars Mr. Lewis from relief. (Resp. Br. at 15-16). However, Respondent's position is not supported by the law since in cases such as these, the Department of Homeland Security has the burden of proving by "clear, unequivocal, and convincing evidence" that an alien admitted to the United States is deportable. *Woodby v. INS*, 385 U.S. 276, 286 (1966). In making that decision, the Immigration Judge, the Board, and the Fourth Circuit all committed reversible error by relying on the ambiguous Form I-9 filled out by Mr. Lewis.

Respondent argues that Mr. Lewis may not properly raise the Immigration Judge's finding that he made a false claim of citizenship because he did not expressly raise it in his initial appeal to the BIA. (Resp. Br. At 15). However, failing to raise an issue of constitutional concern in an initial immigration court proceeding does not strip the

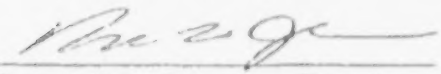
alien of redress by a reviewing court when that claim was subsequently addressed by a reviewing court. *United States v. Williams*, 504 U.S. 35 (1992)(finding that a petitioner does not necessarily waive a claim simply by not raising it in the initial appeal). Rather, this Court has only found a question of law unreachable when it was not raised or passed upon by the court below. *Id.* In this case, although Mr. Lewis did not present an argument regarding Section 1227(a)(3)(D) at the BIA, the Board did address this issue in its March 22, 2007 Decision. (*See* Pet. Br. at 9a-10a.). When the BIA issued its March 22, 2007 opinion discussing this issue, the BIA specifically noted that Mr. Lewis was ineligible for relief because of the Immigration Judge's finding that Mr. Lewis made a false claim of US Citizenship under 8 U.S.C. § 1227(a)(3)(D).

Because the Fourth Circuit denied relief based on jurisdictional issues, and endorsed the outdated logic of *Mosere*, this Court may properly consider the underlying issue of whether it was error to rely on the old and ambiguous Form I-9. The Fourth Circuit did not directly address this issue; however, the Section 1227(a)(3)(D) argument was raised by Mr. Lewis in his brief to the Fourth Circuit and is properly before this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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